United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1713 ~~74-8192~~ B

To be argued by
STEPHEN J. FALLIS

P/S

United States Court of Appeals

For the Second Circuit

SPECIAL PROSECUTOR OF THE STATE OF NEW YORK,

Plaintiff-Appellant,

against

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, and DIRECTOR, UNITED STATES MARSHALS SERVICE,

Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

MAURICE H. NADJARI
Deputy Attorney General
Attorney for Plaintiff-Appellant
2 World Trade Center
New York, New York 10047

STEPHEN J. FALLIS
JORDAN J. FISKE
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

For the Second Circuit

Docket No. 74-8192

SPECIAL PROSECUTOR OF THE STATE OF NEW YORK,
Plaintiff-Appellant,

against

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, and DIRECTOR, UNITED STATES MARSHALS SERVICE,
Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

Preliminary Statement

The decision herein appealed from was rendered by Judge Arnold Bauman of the Southern District Court.

The Issue

The issue presented by this appeal is whether the United States Attorney can interfere with the lawful service of state process and affirmatively prevent a willing state witness from testifying before state courts and grand juries.

Statement

On May 1, 1974, New York State Supreme Court Justice John Murtagh issued an order directing the United States Attorney for the Southern District of New York and the Chief United States Marshal to show cause on May 2, 1974, why they should not be directed to produce Detective Robert Leuci before a Special Anti-corruption Grand Jury or, alternatively, why they should not desist from interfering with and preventing the appearance and testimony of Detective Leuci before the Grand Jury (Appendix A).

The United States Attorney's Office immediately removed the proceeding to the Federal District Court pursuant to 28 U.S.C. §1442(a) 1 (Appendix C).

On May 2, 1974, the parties first appeared in Federal District Court. Judge Bauman, recognizing the urgency of the matter, directed the parties to submit their briefs and argue the case on Monday, May 6, 1974.

At the conclusion of oral argument on Monday, May 6, 1974, Judge Bauman directed both sides to submit any additional or reply affidavits and memoranda to the Court by 5:00 P.M., Wednesday, May 8, 1974, and indicated that he would render a decision on Friday, May 10, 1974, or Monday, May 13, 1974.

On Monday, May 13, 1974, Judge Bauman handed down a decision vacating the Show Cause Order issued by Justice Murtagh and dismissing the plaintiff's action on the grounds that the Court lacked jurisdiction to grant the relief requested (Appendix I).

Discussion of the Facts

Detective Robert Leuci is presently employed as a New York City Police Officer. During 1971 and part of 1972, Detective Leuci became an undercover agent in cooperation with the Knapp Commission and the United States Attorney's Office. During that period of time Detective Leuci had a number of conversations with corrupt individuals in the New York Police Department and in the criminal justice system (Appendix B, p. 2).

In 1972, Detective Leuci testified in a federal criminal trial. He admitted that he had been previously involved in four prior criminal transactions, but he denied any further complicity in wrongdoing (Appendix B, p. 2).

In August of 1973, the United States Attorney referred Detective Leuci and the evidence he accumulated to this Office, because the Federal Government did not have jurisdiction to prosecute the crimes disclosed by the evidence (Appendix B, p. 2).

As a result of Leuci's testimony the Extraordinary and Special Grand Juries of Bronx, Kings and New York Counties returned six indictments, two of which are still sealed (Appendix B, p. 2).

Detective Leuci is also a witness in several other cases which are currently pending before the Extraordinary and Special Grand Jury in New York County (Appendix B, p. 2).

On April 18, 1974, Detective Leuci advised the Special Prosecutor's Office that he had previously testified falsely and that he wanted to make a full and complete disclosure

to us about his entire criminal activities. He indicated that his criminal activities far exceeded what he had previously admitted in the course of federal and state trials. Leuci indicated that he wanted to make his disclosures simultaneously to the Special Prosecutor's Office and the United States Attorney's Offices for the Southern and Eastern Districts of New York (Appendix B, p. 2).

The United States Attorney's Office not only rejected this reasonable approach, but also took affirmative steps to prevent the Special Prosecutor and State Grand Juries from learning the true nature and extent of Leuci's prior criminal activity.

The *undisputed* methods employed by the United States Attorney's Office constitute the gravamen of this action.

On or about April 18, 1974, the United States Attorney's Office ordered Leuci not to go to the Special Prosecutor's Office, where the Special Anti-corruption Grand Jury sits, or to speak to any member of that Office (Appendix B, p. 2). The United States Attorney does not deny this allegation (see affidavit of Mr. Curran, Appendix E; Minutes of oral argument, Appendix F, specifically pp. 37-38). By preventing a willing State's witness from appearing before a State Grand Jury and preventing a state employee from giving evidence of corruption to the state agency which has the responsibility of investigating and prosecuting corruption, the United States Attorney acted beyond the scope of his lawful authority and in a manner that constituted an abuse of his discretion.

The United States Attorney thereafter replaced Leuci's regular New York City Police bodyguards with Federal

Marshals in order to physically prevent the Special Prosecutor from serving a lawful subpoena on Detective Leuci while he was in the State jurisdiction (Appendix B, p. 3; see also Appendix F, pp. 23-25, where the plaintiff requested a hearing on the issue; see also Appendix F, pp. 38-39, where the United States Attorney admitted the allegation). By interfering with the lawful service of State subpoena process, the United States Attorney's Office again acted improperly.

The arbitrary *ultra vires* action by the United States Attorney's Office has disrupted vital State judicial and prosecutorial functions. Detective Leuci's recantation requires that we immediately reappraise pending indictments to determine whether we can proceed with the cases and vouch for Leuci's credibility to a petit jury. Leuci's new disclosures obviously may have an important bearing on the validity of the indictments and may influence the proper determination of motions directed to those indictments which are pending in State Court. Moreover, the unresolved problem prohibits us from making State cases ready for trial. Our failure to move those indictments for trial has jeopardized the cases by exposing them to motions to dismiss for delay of prosecution. In addition, Leuci's testimony is crucial to the intelligent completion of the pending Grand Jury investigations. Some of the evidence Leuci has relates to crimes committed in 1968 and 1969. The State statute of limitations is expiring in relation to these crimes.

The Special Prosecutor's Office had no recourse but to seek redress through the courts. We sought either to compel the United States Attorney to make Leuci available, or, *at least,* to desist in their active interference with state process.

POINT I

The United States Attorney has interfered with the lawful service of state process and prevented a voluntary State witness from testifying before a State Grand Jury and at a criminal trial.

Detective Robert Leuci, a New York City Police Officer, has been cooperating with the Office of the Special Prosecutor on almost a daily basis for close to a year. During that period of time he has testified repeatedly before Grand Juries in Bronx, Kings, and New York County. His testimony resulted in six indictments for crimes involving corruption in the New York City Police Department. Four of the indictments are already before the Court and are on the trial calendar. Two of the indictments resulting from Leuci's testimony had been sealed, and we have been forced to delay the execution of the warrants in relation to these indictments because we are unable to learn from Leuci whether his new disclosures undermine those indictments. In addition, there are three other Grand Jury investigations presently in progress where Detective Leuci is in the midst of his testimony.

In April of this year, Detective Leuci indicated to us that he had previously lied about his criminal involvement and that he wished to make full and complete disclosures to us and to the United States Attorneys for the Eastern and Southern Districts. At that stage it became imperative that we question Leuci concerning his disclosures.

We were subsequently advised that the United States Attorney had directed Detective Leuci not to speak to the

Special Prosecutor. The United States Attorney was aware that we were going to issue a subpoena to Leuci. As we were about to subpoena Leuci, the United States Attorney deliberately interfered with the service of state process by removing Leuci's New York City Police bodyguards and replacing them with Federal Marshals. The federal prosecutor has also had Leuci moved out of State from time to time in order to avoid state process.

The federal prosecutor's arbitrary action has already suspended the trial of criminal actions for more than six weeks. It has also suspended and obstructed ongoing Grand Jury investigations into corruption in the New York City criminal justice system. It has interfered with the arrest of criminals who have already been indicted. Lastly, Mr. Curran has prevented a New York City employee from divulging information about corruption in the City Police Department to the state agency specifically created and entrusted to receive that information and initiate investigations and prosecutions with it.

Because of Mr. Curran's arbitrary and illegal interference with state process, this office was required to seek redress in the Courts. Our action was especially mandated in that pending indictments are presently in jeopardy of dismissal for failure to provide the defendants with a speedy trial.

It is incontrovertible that any court of general jurisdiction has the inherent power to enforce its mandates and process. New York State Supreme Courts, of course, are courts of general jurisdiction with these intrinsic powers

(Judiciary Law, Article 19, §§750, 753). This universal principle was enunciated simply and effectively in *King* v. *Barnes* [113 N.Y. 476 (1889)]. In that case the New York Court of Appeals held:

> Any person who interferes with the process, control or action of the court in pending litigation, unlawfully and without authority, is guilty of a civil contempt, if his act defeats, impairs, impedes or prejudices the rights or remedy of a party to such action or proceeding.

The applicability of that principle to the instant case is obvious. The federal prosecutor's *ultra vires* acts of impeding and interfering with state subpoena are clearly and unequivocally illegal. In fact, it appears that this conduct violates state penal law as well as similar standards established in federal law (Penal Law §195.05; 18 U.S.C. §1501; Penal Law §215.10; 18 U.S.C. §1510).

The Federal District Court—on removal—has the same power to redress those wrongs as the State Court manifestly has.

The Fourth Circuit aptly stated the rule in *State of North Carolina* v. *Carr* [386 F.2d 129, 131 (1967)]:

> The purpose of the removal statute is to take from the State Courts the indefeasible power to hold an officer or agent of the United States criminally or civilly liable for an act allegedly performed in the execution of any of the powers or responsibilities of the Federal sovereign. Neither immunity nor impunity is guaranteed the alleged offender; the statute merely transfers his trial to the Federal Courts. State of North Carolina v. Carr, 386 F 2d 129, 131 (4th Cir., 1967) (see 28 USC 1447)

The federal court, moreover, has additional power to address this complaint [*Freeman* v. *Bee Machine Co.*, 319 U.S. 448 (1943)].

Finally, the Court has the district court's inherent supervisory powers over federal officers who are engaged in illegal and unconstitutional action [*Rea* v. *United States*, 350 U.S. 217 (1956)]. This would appear to be especially the case when a federal official involved in wrongdoing seeks refuge in the federal court by removing a state action to that court. Indeed, Judge Bauman stated that he would consider the applicability of the district court's supervisory power (Appendix F, p. 27).

In a rather mystifying argument the United States Attorney contended in the court below that neither the state nor the federal court was entitled to inquire into the legitimacy of his arbitrary action because Leuci was already in federal custody. He contended first that Leuci was in "protective custody" because he received certain benefits of the Omnibus Crime Act. Secondly, the federal prosecutor alleged that Leuci was in "effective" custody because if he attempted to leave he would be arrested as a material witness. It should be noted at the very outset that the federal prosecutor's contentions are that as a result of his illegal action in tampering with Leuci's status, the courts are precluded from inquiring into that tampering. Essentially, we have complained that the United States Attorney has manipulated Leuci in order to avoid state process. The United States Attorney's response is because he has been successful in manipulating Leuci, the courts cannot inquire into it. This is devious cart before the horse advocacy. Putting the federal agent's logical inconsistency aside, an

examination of the federal agent's contentions demonstrate their obvious invalidity.

Mr. Curran's initial argument—that Leuci was in "protective custody" and that any form of federal custody was sufficient to frustrate state judicial process—is manifestly absurd.

Public Law §91-452, Title V, §501-504, which the government refers to as the protective custody statute is entitled "Protected Facilities for Housing Government Witnesses." The word custody does not appear in that statute, and the clear meaning of the statute indicates that any witness who avails himself of its provisions does so on a voluntary basis —he is clearly not in custody. Moreover, the term "protective custody" is a popular term of art which does not appear anywhere in any federal statute or even in the law dictionary. Thus the term "protective custody" has no legal significance and is currently used to describe a voluntary non-custodial form of protection. It is absurd to contend that simply because a witness is availing himself of any of the provisions of the protected facilities statute, he is thereby immune from state service or in federal custody.

The United States Attorney's Office has shamefully abused the "protected facilities" statute, which was legitimately passed by Congress in order to protect citizens and not to give an overzealous official authority to imprison a cooperative witness. It can scarcely be argued that Congress would authorize money for use by an executive agency which seeks to by-pass state judicial process. An extension of the concept of federal custody on that ground to cover the instant case is obviously unwarranted.

Mr. Curran's second contention—that while Leuci was only in voluntary "protective custody," if he attempted to leave the Federal Marshals he would be arrested as a material witness, and Leuci therefore was "in effect" in custody—is equally erroneous, but more reprehensible.

That argument assumes one important fact, which, if true, is frightening to every citizen. That assumption is that the federal court will automatically grant any application by the government to hold a witness as a material witness in spite of the fact that the material witness provisions of the United States Code require the government to make a showing that the witness will not be amenable to service of a subpoena. An application to a federal court to make Leuci a material witness in order to avoid state process compounds the wrongdoing and attempts to perpetrate a fraud on the federal court. Obviously Leuci is not in "actual" federal custody unless you make the arrogant assumption that a federal judge would automatically hold him as a material witness upon the application of the United States Attorney's Office.

The federal material witness statute empowers the court to fix bail to insure the witness's availability for trial. A federal material witness on bail is clearly subject to the state subpoena power. Therefore the United States Attorney's argument assumes not only that any federal judge will hold Leuci as a material witness, but will set an exorbitant bail that is beyond Leuci's reach.

This gross insensitivity to the constitutional rights of a cooperative witness is clearly demonstrated in the following colloquy:

> The Court: Is [Detective Leuci] being detained by the United States Marshals? I am trying to get the extent of the custody we are talking about.
>
> Mr. Curran: So far as I know at this moment he is not being detained against his will, but he is in their custody and should he attempt to leave that custody, he would then be detained and brought before a court and arraigned as a material witness.
>
> At this moment, as far as I know, he is not being detained in the sense, because there is no reason to do that. He hasn't attempted to leave the custody.
>
> The Court: That is interesting. He is not being detained, but the moment he tries to go, he will be, is that it, Mr. Curran?
>
> Mr. Curran: That is correct, your Honor, yes * * * (Transcript of oral argument, p. 16).

This is a perfect example of the arbitrary and illegal action about which we complain.

In the assertion of his spacious arguments Mr. Curran has not only displayed an arrogant disregard of state interests, but also a grave ignorance of those concepts of due process which guide our federal courts in their handling of material witness applications (see *United States* v. *Archer et al.*, 486 F.2d 670, 677 (2nd Cir. 1973).

POINT II

The learned District Court erred when it found that it lacked jurisdiction to grant relief in this case.

As a result of the United States Attorney's unlawful interference with the service of state process the instant action was initiated in state court. The action seeks a court order directing the United States Attorney and Chief Mar-

shal to produce Leuci before a State Grand Jury or *alternatively* directing them to stop interfering with and preventing the appearance of Leuci before the Grand Jury. In practical terms the second alternative clearly called for a withdrawal of the United States Attorney's order to Leuci not to appear before the State Grand Jury and further called for a direction that the United States Marshals not physically interfere with the service of a state subpoena upon Leuci.

The district court dismissed this action on the unprecedented theory that Leuci was in the "sphere of authority" of the federal government. He was, therefore, beyond the reach of state process. In the discussion which follows it will be established that the decision of the learned court below was entirely erroneous.

The manifest error in this case results from an understandable desire on the part of the Court to avoid deciding the real issue presented by the case. As the Court noted: "The United States Attorney is being proceeded against personally for *ultra vires* acts grossly in excess of his authority as a federal official. Resolving the issue would, of necessity, determine whether the question of the United States Attorney abused his discretion in placing Leuci under protective custody and preventing the Special Prosecutor from obtaining access to him. This I decline to do" (Opinion, p. 7).

The Court's diplomatic gesture, in attempting to avoid ruling on the federal prosecutor's impropriety is, of course, the underlying fault which has diverted the Court into a course of action which has led to obvious error.

Because the Court wished to avoid the confrontation requisite to resolve the issue presented by the case, it was compelled to rely upon the legal arguments offered by the United States Attorney—which indeed were meager pickings. The paltry arguments advanced by the United States Attorney—that Leuci was in protective custody pursuant to the financial provisions of the Omnibus Crime Act, and that he was in custody in that he could be arrested as a material witness if he attempted to leave his bodyguards—were easily exposed as fallacious and afforded the Court no reasonable basis for ruling in the matter.

Apparently feeling a parochial necessity to justify the action taken by the United States Attorney, the Court fashions a remarkable new concept that the Supreme Court of New York State is precluded from subpoenaing a New York City police officer as a witness in state criminal trials and grand jury proceedings if he has been a witness in a completed federal trial, and the United States Attorney wishes to investigate his credibility.

An analysis of the manner in which the Court arrived at this incredible conclusion is most informative. The Court started with two United States Supreme Court cases which stand for the proposition that a state court may not inquire on *habeas corpus* into the legality of the imprisonment of a federal prisoner [*Ableman* v. *Booth*, 68 U.S. 506 (1859); *Tarble's Case*, 80 U.S. 397 (1872)].

The Court then noted that for "*habeas corpus*" purposes a parolee may be in "custody" because of the restraints upon liberty involved in that status [*Jones* v. *Cunningham*, 371 U.S. 236 (1963); see also 28 U.S.C. 2241]. Of course, in the *Cunningham* case there is not the slightest

suggestion that a parolee may not be subpoenaed to testify in state criminal proceedings. In fact, the opposite is the accepted law and practice—federal and state parolees are regularly arrested, indicted and prosecuted for state crimes while they are on parole or probation. Similarly, a federal material witness who might be deemed within the custody of the court for *habeas corpus* purposes, but who is not confined to an institution and is living and working in society is certainly subject to state subpoena process. The state moreover would not be required to use the writ of *habeas corpus ad testificandum* to gain jurisdiction over such persons—service of a subpoena is clearly sufficient.

After developing a long multi-page discussion about expanded concepts of custody the Court then remarkably switches gear and indicates that custody is really not the issue (opinion pp. 12-3). "Rather, one must consider the degree to which Leuci falls within the sphere of federal authority" (*id.* p. 12).

At this stage of the opinion the Court loses its bearings and embarks on an entirely new course. It holds that a person "within the sphere of federal authority" is exempt from state process. The Court finds that Leuci is "an object of continuing federal concern" and that "because the United States Attorney is entitled to persue his ongoing investigation into Leuci's credibility, it follows that Leuci falls within the sphere of federal authority as that term was defined in *Ableman* and *Tarble's*. He is therefore beyond the reach of any writ of habeas corpus issued by a state court" [Opinion, p. 14].

Of course, *Ableman* and *Tarble's* do not even remotely support such an exaggerated claim. Even the federal prose-

cutor never advanced such an untenable position. In addition, the Court's finding of fact, unsupported by a hearing on the issue, that the federal prosecutor is investigating the credibility of Leuci in relation to Rosner is mistaken—that investigation having been completed when this action was initiated.

A simple reading of *Ableman* and *Tarble's* demonstrates that they do not support the Court's hypothesis.

Ableman is a case decided in 1858 involving the runaway slave law. It appears that the Courts of the State of Wisconsin were unsympathetic to federal prosecutions of those people who helped runaway slaves escape. The state court intervened in federal prosecution, declared the federal statute unconstitutional and freed a federal prisoner who had been convicted for a federal crime. Although morally bankrupt in its ethical standards, the opinion does accurately reflect the law in so far as procedure is concerned. It holds that a state court may not intervene and vacate a federal prosecution. There is not the slightest suggestion that a state court may not subpoena a material witness who has had some contact with a federal criminal case.

Likewise, the opinion in *Tarble's* case does not in any way support the district court's strained reading of it. In this case, decided in 1871, a Wisconsin Court intervened in a federal prosecution for desertion from the army. The state court in a *habeas corpus* proceeding determined that the petitioner was a minor and that his admission to the army was invalid. It followed, therefore, that the petitioner could not be charged with desertion since he never was properly in the army. The United States Supreme

Court held that state courts have no authority to inquire into the validity of a federal prisoner's incarceration or to inquire into the validity of a soldier's enlistment into the federal army. Again, it is obvious that this case in no way supports the lower court's view that state courts may not subpoena a witness who has federal bodyguards. The federal court's effort to extend the rationale of these decisions to the instant case is absurd. The cases involve federal prisoners—one awaiting trial, the other convicted after a federal trial. They involve state intervention into ongoing federal prosecutions. They involve litigation of claims of exclusive federal concern—the federal fugitive slave act and the other the discipline in the federal army for desertion.

The only bearing the decision has on the instant case is the caveat expressed by the Court: "Neither government, federal or state can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other." Later the Court reiterates the thought "neither can intrude with judicial process into the domain of the others". In the instant case we have a federal prosecutor unlawfully interfering with the judicial process of the state court.

In *Younger* v. *Harris* [401 U.S. 37, 44 (1971)] the United States Supreme Court aptly stated the principle which should guide this Court in resolving this matter:

> There must be a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are

> left free to perform their separate functions in their separate ways * * * This concept does not mean blind deference to "State Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Government and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states.

The Lower Court states that because the Government has a right to debrief Leuci he is beyond the reach of state process—a procedure that should have been long completed. The Court ignores the more imperative interests of the State in gaining access to Leuci. The Court mentions Leuci's importance to the *Rosner Case,* but fails to consider the six State indictments and three State Grand Jury investigations which are in jeopardy. The Lower Court disregards the fact that Leuci was already a State witness and that his status as a State witness was, in part, initiated by the same United States Attorney's Office which has interfered with that relationship.

Under these circumstances, the order of the district court should be vacated and an order be entered directing the United States Attorney and the Chief United States Marshal to produce Detective Leuci before the Grand Jury or alternatively directing them not to interfere with the service of state process on Detective Leuci.

Conclusion

The order of the District Court should be vacated and the case remanded to the District Court with instructions to enter an order directing the defendants to produce Detective Leuci before the State Grand Jury or alternatively directing them not to interfere with the service of state process on Detective Leuci.

Respectfully submitted,

MAURICE H. NADJARI
Deputy Attorney General
Attorney for Plaintiff-Appellant
2 World Trade Center
New York, New York 10047

STEPHEN J. FALLIS
JORDAN J. FISKE
Special Assistant Attorneys General
Of Counsel

Service of 2 copies of the
within Brief is hereby
admitted this 31st day of
May 1974
Signed C.J. Curran
Attorney for Defendants-Appellees

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906
(8139)